United Nations A/HRC/WGAD/2018/37

General Assembly

Distr.: General
24 May 2018

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 37/2018 concerning a minor whose name is known by the Working Group (Malaysia)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 18 December 2017, the Working Group transmitted to the Government of Malaysia a communication concerning a minor (whose name is known by the Working Group). The Government submitted a late response to the communication on 7 March 2018. Malaysia is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language,

* Setondji Roland Adjovi did not participate in the discussion of the present case.

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religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. The minor, whose name is known by the Working Group, is a 17-year-old Malaysian national. The minor was 16 years of age at the time of his arrest in February 2017.

5. On 6 February 2017, the minor was arrested, together with several other individuals, by police officers from a subdivision of the police headquarters in Northern Klang, Malaysia. According to the source, the police officers did not disclose the reasons for the minor's arrest. Nonetheless, the source notes that the probable reason could be that the minor had been in a vehicle suspected to have been used in a robbery.

6. On 8 February 2017, one of the persons arrested with the minor died in detention. According to the source, this individual had suffered significant injuries and displayed clear signs of poor health during his remand hearing. The source alleges that the Royal Malaysian Police failed to comply with a magistrate judge's order that the individual receive treatment at a hospital. The source further claims that the minor witnessed the alleged abuse suffered by the deceased individual. The minor was also a witness to the subsequent investigation by the Enforcement Agency Integrity Commission.

7. According to the source, the minor also suffered torture and ill-treatment while in custody. The source alleges that police officers kicked and punched the robbery suspects, including the minor, during the interrogation process. This allegedly involved the police officers beating them with bamboo sticks and pipes, including while they were hung upside-down.

8. The minor was remanded until 14 February 2017, when he was released from custody. He was later re-arrested and remanded at the police headquarters in Banting, Malaysia, until 17 February 2017. The source alleges that the minor was again abused and tortured during that period.

9. On 17 February 2017, the police applied for the minor's remand to be extended. However, the request was rejected on the basis of the minor's injuries. That day, the minor's family lodged a report at the Banting police station.

10. The source alleges that, upon his release, the minor was immediately rearrested by a police officer from the Southern Klang police station and was remanded until 21 February 2017. On 21 February 2017, the minor was remanded for a further four days on the grounds that he could provide assistance in the enquiries into the death of the person he was arrested with on 6 February 2017. That day, the minor's family lodged a second report, this time at the Klang police station.

11. On 25 February 2017, the minor was released and returned to his family. The source reports that a medical examination revealed that the minor had a bleeding nose, wounds, swollen face and feet and bloodshot eyes, which the source alleges were caused by the physical abuse of the minor.

12. On 4 April 2017, the minor was with two friends when the police apprehended them on suspicion that they had committed theft. During their trial, the minor's two friends pleaded guilty to the charges and were sentenced to four months' imprisonment. According to the source, the minor went ahead with his trial and was held in pretrial detention because his family was reluctant to pay bail due to concerns that he may be re-arrested.

13. On 10 September 2017, the minor's family lodged a third report, this time at the Enforcement Agency Integrity Commission, regarding the abuse allegedly suffered by the minor, and in relation to the minor's "chain remand", which source states is a practice involving the re-arresting of an individual at the conclusion of his or her initial remand period in accordance with the Criminal Procedure Code. According to the source,

individuals are usually re-arrested by officers from another police station for a similar crime. They are then subject to new remand orders on the basis of new investigations. In some cases, individuals have been known to be under "chain remand" for up to 80 days.

14. On 13 September 2017, the minor's lawyer advised him to plead guilty to the case against him involving items stolen during the alleged theft in April 2017, as he said he would be released, having technically served his time during the remand period. Upon his release, however, the minor was re-arrested on the same day and brought to the Klang Selatan police station. On 14 September 2017, the minor was taken to the Shah Alam Court for his remand hearing.

15. According to the source, the investigating officer from the Organized Crime Division explained that the minor had been arrested under the 1959 Prevention of Crime Act and would be detained for 21 days for investigation. The source reports that the Act gives the Police the power to detain an individual without trial for a period of 60 days. At the conclusion of the 60-day detention period, the case file is submitted to the Crime Prevention Board, which evaluates the case and determines a sentence. The individual is then released unconditionally, subject to a supervision order with an electronic monitoring device for a period of no more than five years, or subject to a detention order for no more than two years. The terms of the sentence can be extended by the Board at the conclusion of each sentence without judicial review.

16. On 21 September 2017, the minor's lawyer retracted his client's guilty plea in relation to the theft case and proceeded to trial. The Court ordered the minor to be presented in court on 10 October 2017.

17. On 9 November 2017, the minor was sentenced by the Crime Prevention Board under section 15 (1) of the 1959 Prevention of Crime Act to police supervision and house arrest. According to the source, the minor is now required to reside in the locality of Mukim Tanjong Dua Belas and cannot leave unless he obtains the written approval of the Selangor Chief of Police. The minor was also fitted with an electronic monitoring device and is required to report to Banting police station every Monday and Thursday for the first two years of his sentence.

18. The source submits that the detention of the minor was arbitrary under category III. The source argues that the minor was not afforded his right to be heard by the Court For Children with regard to the allegations against him, contrary to the Convention on the Rights of the Child and reflected in section 83 of the 2001 Child Act. Moreover, the source submits that the minor's detention under the 1959 Prevention of Crime Act violated his right to a fair trial, as he was not given any opportunity to be heard by a judicial body and not offered legal representation when the panel sentenced him to house arrest. The source adds that there are currently 142 minors in detention under the 1959 Prevention of Crime Act.

Response from the Government to the regular communication

19. On 18 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 19 February 2018 about the minor's detention, including any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked to justify the minor's detention, as well as their compatibility with international human rights norms.

20. On 16 February 2018, the Government requested an extension of the deadline for response. The extension was granted with a new deadline set at 5 March 2018. The Government replied to the regular communication on 7 March 2018.

21. The response in the present case is therefore considered late, and the Working Group cannot accept the response as if it was presented within the time limit. The source provided the Working Group with further information and clarifications on 22 March 2018.

Discussion

22. In the absence of a timely response from the Government, as indicated in paragraphs 15 and 16 of its methods of work, and in conformity with its practice, the Working Group considered all the relevant information that it has obtained in order to render this opinion.

23. The Working Group is aware that there were two separate legal proceedings initiated against the minor:

(a) The minor was initially detained to assist in investigations pursuant to several police reports, which had been lodged for various offences under the Penal Code, such as rape, armed gang-robbery, housebreaking, theft of a motor vehicle, and other theft. The minor was subsequently detained under the 1959 Prevention of Crime Act, and a supervision order was issued against him (hereafter, the first proceedings);

(b) On 9 April 2017, the minor and two adults were charged with committing an offence of theft with common intention, with an alternative charge under the Penal Code of committing an offence of dishonestly receiving stolen property. The matter was heard before the Magistrates' Court. The minor pleaded guilty on 16 January 2018 and was ordered by the magistrate to be discharged on a good behaviour bond. The minor is to be accompanied by his parents in attending interactive workshops (hereafter, the second proceedings).

Current situation of the minor

24. A preliminary issue for the Working Group is whether the minor is currently detained. On 9 November 2017, the minor was placed under an order by the Crime Prevention Board of police supervision and house arrest. That order is in effect until 8 November 2019. According to the source, this means that the minor is required to reside in a certain locality and to obtain written approval before he leaves that locality. He is also required to wear an electronic monitoring device and to report to police.

25. As the Working Group recently stated, detention is not only a question of legal definition, but also of fact. If the person concerned is not at liberty to leave a place of detention, all the appropriate safeguards that are in place to guard against arbitrary detention must be respected (see A/HRC/36/37, para. 56). Moreover, in its jurisprudence, the Working Group has maintained that house arrest amounts to detention provided that it is carried out in closed premises which the person is not allowed to leave.[1] In determining whether this is the case, the Working Group considers whether there are limitations on the person's physical movements, on receiving visits from others and on various means of communication, as well as the level of security around the place where the person is allegedly detained.[2] In the present case, while the reporting and other conditions imposed on the minor are certainly restrictive, the conditions of house arrest are not met. The minor is not detained in closed premises which he is prevented from leaving. The Working Group is therefore of the view that the minor is not currently detained.

26. The Working Group welcomes the fact that the minor is no longer in detention. According to paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion on a case-by-case basis on whether a detention was arbitrary, notwithstanding the release of the person concerned. The Working Group considers that it is important to render an opinion, given that this case involves serious allegations that a minor has been repeatedly arrested and held on remand. In addition, the Working Group wishes to consider the alleged practice of "chain remand" in Malaysia, as well as the

[1] See, e.g., Opinion No. 13/2007, para. 24; and Deliberation No. 1 on House Arrest, E/CN.4/1993/24, para. 20.

[2] See, e.g., opinion No. 16/2011, in which an individual under house arrest could not meet with foreign diplomats, journalists or other visitors at her apartment, and her mobile telephone and the Internet had been cut off. She was not allowed to leave her apartment, except on short approved trips and under police escort, and the entrance to the compound was guarded by security agents (para. 7). See also Opinions Nos. 47/2006, 41/1993, 39/2013, 30/2012, 21/1992, 18/2005, 12/2010, 11/2005, 11/2001 and 4/2001.

allegation that the minor's detention under the 1959 Prevention of Crime Act does not meet international fair trial standards. In doing so, the Working Group emphasizes that its mandate does not involve consideration of whether the minor has committed any crime, and that its sole focus is whether the minor's previous periods of detention were in accordance with international human rights norms.

27. In determining whether the minor's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. The Government can meet this burden of proof by producing documentary evidence in support of its claims.[3] Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (see A/HRC/19/57, para. 68).

28. According to the source, the minor was almost continuously detained in police custody from 6 to 25 February 2017, and again from 13 September to 9 November 2017 in relation to the first proceedings against him. The minor was also placed in pretrial detention from 4 April 2017 until his release on 13 September 2017 in relation to the second proceedings against him involving the alleged theft. The Working Group discusses each of these periods of detention in turn.

Detention in relation to the first proceedings against the minor

29. The source alleges that when the minor was initially arrested on 6 February 2017, the police officers did not disclose the reasons for his arrest. Instead, the minor was left to assume that the arrest related to the fact that he was in a vehicle suspected of having been used in a robbery. The Working Group was made aware of an arrest report (Bandar Baru Kelang 1368-1371/2017) filed after the minor's arrest on 6 February 2017, which reportedly indicated that the minor had been informed of the reasons for his arrest. However, on the basis of all the information and evidence available to it, the Working Group finds the submissions of the source to be more credible on this point.

30. On the basis of all the information available, the Working Group is convinced that the minor was arrested on 6 February 2017 without having been informed at that time of the reasons for his arrest, in violation of articles 9 and 10 of the Universal Declaration of Human Rights. Moreover, the minor was subsequently re-arrested on two occasions after his release on 14 and 17 February 2017, and there is no information or evidence to suggest that he was afforded his right to be informed of the reasons for his arrest on either of those two occasions.[4] The Working Group considers that informing all arrested persons of the reasons for their arrest is an essential procedural requirement that enables such persons to seek release if they believe that the reasons given are invalid or unfounded, and is necessary in establishing a legal basis for the detention.[5] The Working Group finds that the Government did not establish a legal basis for the minor's detention, which was therefore arbitrary under category I.

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[3] See opinion No. 41/2013, in which the Working Group notes that the source of a communication and the Government do not always have equal access to the evidence, and frequently the Government alone has the relevant information. In that case, the Working Group recalled that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out". See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ, Judgment, 30 November 2010, para. 55.

[4] The source suggests that the minor's remand was extended on 21 February 2017 for reasons related to the minor assisting in the enquiries into the death of the person he was arrested with on 6 February 2017, but this is far from an official reason provided at the time of arrest.

[5] The Working Group has previously found that when reasons are not provided for the detention of an individual, this constitutes a failure to establish a legal basis for the detention. See, e.g., opinions No. 67/2017, No. 46/2017 and No. 28/2016.

31. Furthermore, the source alleges that from 6 to 25 February 2017, the minor was subject to a practice known as "chain remand". According to the source, this practice involves the re-arresting of individuals at the conclusion of their initial remand period, usually by police officers from another police station, so that they are then subject to new remand orders. The minor in the present case was clearly subject to "chain remand", as he was immediately re-arrested following his releases on 14 and 17 February 2017 by officers from different police stations and held under new remand orders. The Government did not address the issue of "chain remand" in its late response.

32. The Working Group considers that, in effect, "chain remand" allows the police to detain a person for prolonged and indefinite periods by circumventing the time limits set out in the Criminal Procedure Code.[6] As the Working Group has found in its jurisprudence involving Malaysia, if the authorities have evidence that a crime has been committed, they must charge suspects rather than detaining them without trial.[7] The Working Group is of the view that "chain remand" is an abuse of power, as well as a violation of the right to liberty, freedom from arbitrary detention, and right to fair trial under articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights.

33. The Government acceded to the Convention on the Rights of the Child in 1995, but it has entered and maintains reservations in relation to certain articles of the Convention, discussed further below. By subjecting the minor to "chain remand", the Government's conduct may be assessed against the obligations found in articles 3 (1) and 40 (2) (b) (i) of the Convention to ensure that the best interests of the minor were a primary consideration, and to afford him the presumption of innocence by respecting his release from custody. The Working Group calls upon the Government to enact new laws and/or amend its existing legislation to prohibit the practice of "chain remand". It is also essential that the courts serve as a safeguard against this practice by conducting a substantive review of the lawfulness and necessity of detention, particularly when the authorities are seeking to hold a person under successive remand orders.

34. In addition, according to the information provided by the source, the minor was re-arrested on 13 September 2017 in relation to the first proceedings against him. The minor appears to have been in custody from 13 September 2017 until he was placed under a supervision order by the Crime Prevention Board on 9 November 2017.[8]

35. According to the source, the investigating officer from the Organized Crime Division stated that the minor had been arrested under the 1959 Prevention of Crime Act and would be detained for 21 days for investigation. The source reports that this Act gives the police the power to detain an individual without trial for a period of 60 days. At the conclusion of the 60-day detention period, the case file is submitted to the Crime Prevention Board, which determines the order. The Board has the power to order unconditional release, impose a supervision order for up to five years, or place an individual under a detention order for up to two years. The terms of the order can be extended by the Board at the conclusion of each order without judicial review.

36. The Working Group considers that the provisions of the Act that allow individuals to be detained without trial for 60 days violate the right to review of the lawfulness of the detention, as it appears that there is no review by a judicial body of the detention at any point during that 60-day period. As the Working Group has stated, the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which

[6] According to the source, under section 117 (2) (a) and (b) of the Malaysian Criminal Procedure Code, individuals arrested for investigation of a serious crime can be remanded for a maximum of 14 days with an application for extension to be filed by the police after the conclusion of the first 7 days of remand. For other crimes, individuals can be remanded for a maximum of 7 days with an application for extension to be filed after the initial 4 days of remand.

[7] See, e.g., opinions No. 32/2008 and No. 4/1997.

[8] The source did not submit any information to suggest that the minor had been released at any stage between his re-arrest on 13 September 2017 and his placement under a supervision order on 9 November 2017.

constitutes a human rights violation.[9] The lack of judicial involvement continues during and after the making of orders, as the Crime Prevention Board is able to place individuals under detention orders and extend those orders without judicial review. The Working Group is of the view that the review of a case and determination of an order of detention or supervision by a non-judicial body does not satisfy minimum fair trial guarantees (see A/HRC/16/47/Add.2, para. 41). The Working Group finds that the minor's detention, hearing and placement under a supervision order pursuant to the 1959 Prevention of Crime Act was not in conformity with articles 10 and 11 (1) of the Universal Declaration of Human Rights. The minor's right to have his matter determined without delay by a competent, independent and impartial authority in a fair hearing is recognized under article 40 (2) (b) (iii) of the Convention on the Rights of the Child.

37. The Working Group takes note that the right to liberty is not absolute and may be subject to restrictions, in accordance with article 29 (2) of the Universal Declaration of Human Rights. The Working Group has also considered whether the 1959 Prevention of Crime Act strikes the balance between the guarantee of rights and freedoms and the necessity of securing respect for the rights of others and meeting the just requirements of morality, public order and the general welfare of a democratic society.

38. The Working Group has consistently held in its jurisprudence that, when a State invokes a restriction on the freedoms provided under international human rights law, it must demonstrate the precise nature of the threat and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the exercise of a right and the threat.[10] In the present case, there was no explanation of whether the minor was alleged to have committed any offence for which he had been placed under a supervision order, nor how the minor had posed any threat to the rights of others or to morality, public order and general welfare. Moreover, it was not clear why the minor had been detained and placed under a supervision order pursuant to 1959 Prevention of Crime Act, which provided for subversion and public order offences, when his initial detention had related to providing assistance on police reports lodged for various offences under the Penal Code.[11] The Working Group therefore finds that the necessity and proportionality of the minor's detention has not been established.

39. The source also argued that the minor was not offered legal representation when he appeared before the Crime Prevention Board. The Working Group is aware that legal representation was reported to be available throughout the procedure leading to the issuance of the supervision order, including during representations before the Board, in accordance with article 151 of the Federal Constitution of Malaysia. However, on the basis of all the information available to it, the Working Group finds the submissions of the source to be more credible on this point.

40. The Working Group recalls that, according to principle 9 and guideline 8 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, all detained persons have the right to legal assistance at any time during their detention, including at no cost if the person does not have adequate means to pay for counsel of his or her choice (paras. 12 and 68). The Working Group considers that the failure to provide the minor with adequate legal representation violated articles 10 and 11 (1) of the Universal Declaration of Human Rights. Moreover, according to articles 12 (2) and 40 (2) (b) (iii) of the Convention on the Rights of the Child, the Government is obliged to provide children with the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a legal representative. The lack of legal assistance was

[9] See United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, para. 2.

[10] See opinion No. 50/2017, para. 76. See also opinions No. 44/2014, para. 24; No. 29/2012, para. 28; and No. 25/2012, para. 57.

[11] According to the source, the 1959 Prevention of Crime Act is broad and has been used to curb terrorism and organized crime and to deal with repeat offenders in Malaysia. In practice, the Police and the Home Ministry have described it as a preventive law to prevent the occurrence of a crime or the proliferation of selected groups of criminals.

particularly serious in this case as it involved a minor and no judicial body was involved in the review. As the source noted in its further clarifications, there is a limited right to judicial review of the Crime Prevention Board's decision, as a challenge can only be brought when there is procedural impropriety involved in making the order.

41. For the above reasons, the Working Group is of the view that the violation of the minor's right to a fair trial during his initial detention and subsequent hearing by the Crime Prevention Board is of such gravity as to give his detention an arbitrary character under category III.

Pretrial detention from 4 April to 13 September 2017 in the second proceedings against the minor

42. The source alleges that on, 4 April 2017, the minor was with two friends when the police apprehended them on suspicion that they had committed theft. The minor's two friends pleaded guilty to the charges, but the minor appears to have been held in pretrial detention until 13 September 2017 when, on the advice of his lawyer, he pleaded guilty to the alleged theft of items and was released.[12] The minor pleaded guilty to theft on 16 January 2018 and was placed on a good-behaviour bond.[13]

43. The source argues that the minor was not afforded his right to be heard by the Court For Children with regard to the allegations against him, contrary to the Convention on the Rights of the Child, and reflected in section 83 of the 2001 Child Act. The source did not elaborate further on this argument. The Working Group is aware that the minor's second proceedings were dealt with by the Magistrates' Court and not in the Court For Children because he was charged with two adult offenders. Under those circumstances, section 83 (4) of the 2001 Child Act appears to require the matter to be heard outside the Court For Children. Although the minor was charged in a normal court, the procedures applied by the court and the sentence imposed on the minor appear to be consistent with the Child Act, and appear to have taken into account the best interests of the minor in accordance with the Convention on the Rights of the Child. Having taken into account all the information available to it on this issue, the Working Group considers that the trial of the minor in the Magistrates' Court does not amount to a violation of the right to fair trial of such gravity as to render the minor's pretrial detention arbitrary. The Working Group wishes to emphasize that this finding is particular to the present case, and that the trial of a minor by an ordinary court in other circumstances may amount to arbitrary detention.

Other issues

44. In addition, the Working Group takes note of the information provided by the source that there are currently some 142 minors in detention under the 1959 Prevention of Crime Act. While those minors were not the subject of the present case, the Working Group considers that their detention clearly falls within its mandate and wishes to provide its views in relation to their situation.

45. The Working Group was informed that the 1959 Prevention of Crime Act was enacted pursuant to a provision of the Federal Constitution of Malaysia that ensures its validity, notwithstanding other guarantees of rights and freedoms under the Constitution, and individuals detained under the Act have the right to file a writ of habeas corpus. However, as noted earlier, the Working Group considers the provisions of the Act that allow for detention without trial for 60 days to be in violation of international human rights norms, regardless of the Act's standing under domestic law. Moreover, the Working Group has previously stated that the remedy of habeas corpus cannot substitute for the universal

[12] The Working Group has explained the principles applicable to pretrial detention, including that it constitutes a grave limitation on the freedom of movement and must be exceptional. See A/HRC/19/57, paras. 48–58.

[13] There was no information to suggest that the minor had been detained in relation to the second proceedings against him between his release on 13 September 2017 and his sentencing in January 2018. In its further clarifications, the source confirmed that the minor had been on bail during that period.

right of any person suspected of the commission of an offence or crime to a fair and public hearing by an independent and impartial tribunal.[14]

46. The detention of minors is subject to article 37 of the Convention on the Rights of the Child.[15] The Working Group takes note that, on 19 July 2010, the Government entered reservations to the Convention on the Rights of the Child as follows:

> The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28 paragraph 1 (a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.[16]

47. As noted earlier in the present opinion, there are also other provisions of the Convention that are relevant to the detention of minors but are not subject to reservations. These include the requirements that the best interests of the child be a primary consideration (art. 3 (1)); that the child be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative (art. 12 (2)); and protection of the child's procedural rights in any criminal matter (e.g. presumption of innocence, right to be notified promptly of charges, the right to appeal etc.) (art. 40 (2)). The Working Group calls upon the Government to ensure that the 142 minors in detention benefit from the provisions of the Convention, as well as from standards provided for in instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.

48. In its voluntary pledges given prior to seeking membership of the Human Rights Council in 2017, the Government made a number of commitments to advancing the rights of children (see A/72/77, paras. 29–30). Although Malaysia was not successful in its candidacy for the Council, the Government has the opportunity to demonstrate that it is committed to this goal by withdrawing its reservations to the Convention on the Rights of the Child. According to the Human Rights Council in its resolution 5/1, these voluntary pledges will be taken into account in the next universal periodic review of Malaysia. Other States and United Nations treaty bodies have also urged the Government to withdraw its reservations to the Convention.[17]

49. Furthermore, the Working Group takes note that the Malaysian courts have determined that the Universal Declaration of Human Rights is not a legally binding instrument and only forms part of the municipal law of Malaysia to the extent that it is not inconsistent with the Federal Constitution of Malaysia and national legislation. The Working Group respectfully disagrees with that position, and refers to its previous remarks on this subject in paragraph 77 of its opinion No. 50/2017:

> … acceptance of this argument would allow States to override their international obligations simply by developing inconsistent national laws. Moreover, the prohibition of the arbitrary deprivation of liberty is of a universally binding nature under customary international law. When the Working Group has determined the deprivation of liberty to be arbitrary in its opinions adopted in relation to Malaysia,

[14] See opinion No. 32/2008, para. 45.

[15] Article 37 provides, inter alia, that: (a) no child shall be subjected to torture or other ill-treatment; (b) no child shall be deprived of his or her liberty unlawfully or arbitrarily, and arrest, detention or imprisonment of a child shall be a measure of last resort and for the shortest appropriate period of time; (c) every child deprived of his or her liberty shall be treated with humanity and respect for their inherent dignity and in a matter which takes into account their needs; and (d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

[16] See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

[17] See report of the Working Group on the Universal Periodic Review of Malaysia, A/HRC/25/10, paras. 146.29, 146.32 and 146.34–146.35. See also CRC/C/MYS/CO/1, paras. 11–12 and 38–39.

it has consistently found a violation of the Universal Declaration of Human Rights and requested the Government to bring the situation of the detained person into conformity. In its resolution 5/1, the Human Rights Council established that the Universal Declaration is one of the instruments that forms the basis of the universal periodic review of States, including Malaysia.

50. In addition, the Working Group wishes to express its grave concern about the alleged torture and ill-treatment of the minor while he was in police custody. According to the source, the minor was physically abused on at least three occasions while he was in custody, that is, prior to his releases on 14 and 17 February 2017, and during his detention from 17 to 25 February 2017. The minor was allegedly kicked and punched during the interrogation process and beaten with bamboo sticks and pipes while hung upside down. Moreover, according to the source, a medical examination of the minor after his release on 25 February 2017 revealed injuries consistent with this account. The Working Group considers those allegations to be credible, given that it found torture and ill-treatment in police stations to be common during its visit to Malaysia in June 2010 (see A/HRC/16/47/Add.2, para. 50).

51. The Working Group is particularly concerned that the authorities were aware of these allegations, but do not appear to have acted on them. For example, the minor's family lodged two reports to the police on 17 and 21 February 2017, as well as one on 10 September 2017 to the Enforcement Agency Integrity Commission regarding the abuse allegedly suffered by the minor.[18] In addition, on 17 February 2017, an application by the police for the minor's remand to be extended was rejected on the basis of the minor's injuries, presumably by a magistrate tasked with reviewing the period of remand under the Criminal Procedure Code. Despite being made aware of these allegations, the police re-arrested and placed the minor in remand on 17 February 2017, where he was reportedly subjected to further abuse. Given the investigation into the death of one of the individuals arrested with the minor on 6 February 2017,[19] the Government should have ensured the safety of the minor in accordance with the Convention on the Rights of the Child. In the light of these allegations, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

52. Finally, the Working Group would welcome the opportunity to work constructively with the Government to address the Working Group's concerns in relation to arbitrary detention in Malaysia. In April 2015, the Working Group sent a request to the Government to undertake a country visit, as a follow-up to its earlier visit to Malaysia in 2010, and looks forward to a positive response. Given that the human rights record of Malaysia will be subject to review during the third cycle of the universal periodic review in November 2018, an opportunity exists for the Government to enhance its cooperation with the special procedure mandate holders. In this context, the Working Group notes with appreciation that the Government has reiterated its readiness to work with the Working Group in addressing issues or cases that it brings to the attention of the Government, in line with the commitment of Malaysia to the promotion and protection of human rights.

Disposition

53. In the light of the foregoing, the Working Group renders the following opinion:

The detention of the minor from 6 to 25 February 2017 and from 13 September to 9 November 2017, being in contravention of articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights, is arbitrary and falls within categories I and III.

[18] The Working Group is aware that two reports were lodged with the police, and that the Government is closely monitoring ongoing police investigations into those reports. The Working Group is also aware that the source's family lodged a complaint with the Enforcement Agency Integrity Commission, which is gathering documents and evidence in order to conclude its investigation.

[19] An investigation was immediately carried out in relation to the death of this individual, and the case is now pending before a court.

54. The Working Group requests the Government of Malaysia to take the steps necessary to remedy the situation of the minor without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights. The Working Group urges the Government to accede to the International Covenant on Civil and Political Rights, and to withdraw all reservations to the Convention on the Rights of the Child.

55. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord the minor an enforceable right to compensation and other reparations for the period in which he was arbitrarily detained, in accordance with international law.

56. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of the minor, including his numerous arrests on past occasions and alleged torture and ill-treatment while in police custody, and to take appropriate measures against those responsible for the violation of his rights.

57. The Working Group requests the Government to bring its laws, particularly the 1959 Prevention of Crime Act, into conformity with the recommendations made in the present opinion and with the obligations of Malaysia under international human rights law.

58. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

Follow-up procedure

59. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparations have been made to the minor;

(b) Whether an investigation has been conducted into the violation of the minor's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Malaysia with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

60. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

61. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

62. The Government should disseminate through all available means the present opinion among all stakeholders.

63. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily detained, and to inform the Working Group of the steps they have taken.[20]

[*Adopted on 26 April 2018*]

[20] See Human Rights Council resolution 33/30, paras. 3 and 7.